No. 12,547

IN THE

United States Court of Appeals

For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

Petition for Rehearing

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SUBJECT INDEX

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Comes now the appellee and moves the Court for a rehearing of the above entitled appeal upon the ground that the Court erred in assuming certain facts, for the purposes of its Opinion, which do not appear either in evidence in the case, or by any reasonable inference from such evidence, and further upon the ground that the Court erred in announcing the rule of res ipsa loquitur as applied to the facts shown by the evidence in this case; and

Appellee respectfully requests that the issuance of mandate in this matter be withheld as suggested in the Manual of Federal Appellate Procedure by Paul J. O'Brien (Chapter XXVIII, at page 222), to give the appellee an opportunity to prepare proceedings in certiorari in the event such remedy may later be deemed appropriate.

ARGUMENT

In support of the foregoing motion for re-hearing, appellee submits as follows:

A. Failure of Evidence to Support Court's Opinion.

1. While it does appear that this Court agrees with appellee's opening statement that verdicts in F.E.L.A. cases may not be based upon speculation, and that it is still necessary for the plaintiff to produce more than a scintilla of evidence before such cases may be left to the jury, yet the Court has evolved, on pages 3 and 4 of its Opinion, a theory of the accident which overlooks certain facts established by the evidence and assumes certain other facts which did not appear in evidence. Appellee admits, of course, that the ingenuity of the human mind might discover several possible ways in which the accident in this case could have happened, but such possibilities involve the very element of speculation which the appellate court has repeatedly found objectionable in other appeals.

The Court's theory of the accident, outlined on pages 3 and 4 of the Opinion, assumes:

(a) That the photographs, Exhibits C-4 and C-5, portray such depression in the ballast between the two ties, pictured there, as would raise some inference that a railroad surveyor might mark such spot with a survey stake for attention;

(b) That this depression had existed for some appreciable length of time and was not merely the result of the railroad investigators' clearing away the ballast so that a clear photograph might be taken of the side of the tie to show the hole where the stake had been driven;

(c) That the depression was not caused solely and only at the time of the accident by the down thrust of the stake; or

(d) That Exhibits C-4 and C-5 were meant to portray the conditions of the track at the time of the accident, other than the appearance of the hole in the side of the tie.

Regarding assumption (a), there was, of course, no evidence nor any reasonable inference from any of the evidence, that railroad surveyors are under some duty to fill every depression in the railroad ballast. Other photographs of the track show that the ballast at the place of the accident was in good condition and not in any way endangering the safety of passing trains or other vehicles. All of defendant's evidence was available to plaintiff by the ordinary process of deposition and discovery and if plaintiff at any time, other than in his appellate brief, had maintained that the depression shown on Exhibits C-4 and C-5 was such as to make survey and fill work necessary, such theory could easily have been substantiated by actual testimony to that effect. No evidence, nor any reasonable inference therefrom, exists that the "depression" in ballast shown in the photographs was such defect in the ballast as warranted attention by the railroad surveyors.

In connection with assumption (b), it is obvious that the sole purpose for the taking of these photographs was the demonstration of the hole in the side of the tie, and that the photographer did everything necessary to make the area clearly visible on the photograph, it being a reasonable assumption that the photographer or the investigators cleared the ballast so as to give a clear picture of the hole

in the side of the tie. There is not a scintilla of evidence that a "depression" existed at this point at the time of the accident or for any appreciable time before the accident, and the only evidence showed that some ballast had been pressed down or displaced by the impact of the stick itself. It is pure speculation that any low place existed at the point of accident when the accident occurred. It was only for the first time in appellant's brief that such contention was made.

On assumption (c), the positive testimony was that the ballast was "crushed down" by the stake at time of impact.

Finally, on assumption (d), it is submitted that only by pure speculation can it be maintained that the photograph was intended to portray the condition of the ballast at the time the accident occurred. Subsequent to the accident and before the photograph was taken, the City Marshal of Benson and his friend had made an investigation of the place of the accident, and thereafter railroad employees, engineers and photographers had all carried on a thorough investigation to determine how the accident might have happened. All of these proceedings might well have resulted in some depression at the place found by the Court on the photograph.

The conclusion, we urge, is inescapable that the Court, in writing its Opinion, has made assumptions which are not justified by the record in the case. While there was some evidence that the ballast at the place where the surveyor's stake derailed the motor car was crushed down or below the level of other ballast, there was, as we have shown, no evidence that this was such low spot as needed correction by a surveyor and a section gang, there was no evidence that the low spot existed at the time of the acci-

lent and was not the result of the efforts of investigators nd others to determine the cause of the accident by examnation of the place where the surveyor's stake had entered he side of the tie; there was positive testimony that the allast was apparently crushed down by the stake at the ime of impact, and, finally, there was no evidence that the hotographs to which the Court refers were intended to do nything but give a clear picture of the place where the urveyor's stake had entered the side of the railroad tie. he photographs were not in evidence as any proof that a ow spot on the ballast existed at the time of the accident s portrayed in the photographs, or that such low spot had xisted at any time other than at the time the photographs ere taken.

2. Then the Court assumes, on pages 3 and 4 of the pinion, that a surveyor's stake may have been carelessly laced between the rails so that its end protruded fourteen r sixteen inches, more or less, above the level of the rails, height to which it must have been extended if it were to ome into contact with the undercarriage of the car (T. 65). The following reasons make it seem that such assumpion is again pure speculation:

(a) The testimony specifically showed that such stakes were either found lying on the roadbed or alongside of the roadbed, *or were driven into the roadbed so as to extend not more than three inches from the top of the tie and below the top of the rail* (T. 175). No evidence indicated that stakes were ever found in the position suggested by the Court. No engineering reason can be imagined for such stake position. Survey stakes are driven down into the ballast so that the top of the stake indicates the level to which the ballast is

to be filled. Obviously the ballast cannot come higher than the rail, and therefore the top of the survey stake must be lower than the rail. The ballast is filled in to the top of the stake, which is below the top of the rail.

(b) The plaintiff himself negatived such position of the stake since he testified that he was performing his duties, and as part of his duties he ascertained that he had a clear track on three trips over the spot (T. 59, 64-5, 69, 73, 228). Certainly a stake protruding fourteen to sixteen inches above the rail, in broad noon, on a straight, level transcontinental railroad track must be visible to anyone who passes over the place twice within an hour and comes to the place a third time within the hour. It seems almost impossible to believe that such stake would be in any position described by the Court and yet wholly invisible to the plaintiff, sitting upon an open motor car, looking ahead, in pursuance of his duties, to see that he had a clear track, the motor car proceeding at the slow speed of seventeen miles per hour on a single track, in open country where there were no crossings or other things to district plaintiff's attention, the motor car itself being low on the track and the plaintiff in possession of perfect eyesight.

(c) Then a final reason why the stake could not have been in the position supposed by the Court is, as pointed out in appellee's brief, demonstrated by the physical makeup of the motor car itself. Three and one-half inches in front of the brake rod and extending below the brake rod for two and one-half inches was a solid piece of angle iron extending crossways

the full width of the car (T. 364 and photographs), which obviously would act as a fender or bumper, preventing any stake which struck it from thrusting up and over the brake rod immediately behind it, in the manner shown by the photographs and the evidence.

We again respectfully submit that the only way the surveyor's stake could thrust its head between the angle iron and over the brake rod so as to wedge itself firmly at a forty-five degree angle, between the brake rod and the floor of the motor car, was by being in movement up from the track at the instant that the motor car was passing over it. If the stake had been standing at the height assumed by the Court, loosely stuck into the roadbed at a forty-five degree angle so that the force of the motor car drove the stake through the ballast and into the side of the tie, the top of the stake would inevitably first hit the angle iron which protruded below the brake rod and, we again respectfully urge, the top of the stake would never have come into position *between* the angle iron and over the brake rod immediately behind it. The top of the survey stake would have to be low enough to miss the angle iron and then, in the three and one-half inch space between the angle iron and the brake rod, at a time when the motor car was proceeding about seventeen miles per hour, the survey stake would have to jump from the hole in which it was stuck into the ballast, a distance of two and one-half inches and more, to wedge itself firmly between the top of the brake rod and the floor of the car. It does seem to us that this is carrying speculation to its utmost limits.

3. In its Opinion the Court puts some emphasis on the fact that the motor car might have struck the surveyor's stake and loosened the stake during two trips over it prior to the accident. It is earnestly submitted that, considering the length of the stake and the fact, if the Court's assumption is correct, that it must have been loosely driven into the ballast so that the subsequent impact of the motor car on the stake drove it through the ballast and into the side of the tie, any prior striking of the stake could only have resulted in a lowering of the stake below the level of the angle iron on the bottom of the motor car and thus make it impossible for the stake to thrust up and over the brake rod behind the angle iron.

In conclusion to this part of the argument, the appellee submits that the court in its Opinion has made assumptions and inferences from the evidence not justified thereby, and has failed to consider substantial evidence contradicting or explaining the assumptions which the Court has made to support its Opinion.

B. Res Ipsa Loquitur.

It is admitted that the United States Supreme Court has extended this doctrine to its utmost limits, but the United States Supreme Court to date has said only that this rule applies *if* ONE *of the instrumentalities which might have caused the accident was within the sole and exclusive control of the defendant or its employees.* In the *Jesionowski* case it was the "frog" *which was not connected with the switch,* which the plaintiff was handling, *in any way* and which might have caused the accident there. In the *Johnson* case it was the rope sling which was being used by another employee, which had not been touched by the injured em-

ployee and which might have caused the accident. And in the *Rocona* case it was the defendant's exclusive control of the tugboat which the Court held might have caused the accident.

In the present case, although plaintiff was represented by able counsel at the trial and by experienced and learned special counsel on appeal, neither by the evidence adduced at the trial nor by any argument made on appeal has it been shown that there was one instrumentality in any way connected with the accident which was within the sole control of the defendant or its employees. The Court has assumed that the plaintiff was in control of the motor car and the equipment thereon, but has further assumed, for the purpose of trial, that no negligence on the part of the plaintiff in the control of the motor car and the instruments thereon contributed in any way to the accident and the injury. We are not concerned here with specific evidence of negligence which, as we have pointed out in the preceding section, cannot be found in the record of the present case. We are here concerned with a permissible inference that since the defendant company had sole control of the condition of the railroad track and all obstructions or dangerous objects thereon, then it may be presumed that the defendant was in some way negligent in the happening of the accident. The basis for this assumption, however, we respectfully submit, does not exist. The defendant company *did not have* sole control and supervision of the track upon which plaintiff was driving his motor car. The specific duties of *the plaintiff* included a watch for objects which might be dangerous upon the right of way, and the plaintiff admitted in evidence that he was en-

gaged in performance of these duties, that is, the ascertaining that there was a clear track ahead (T. 59, 64-5, 69, 73, 228). Therefore, the discovery and elimination or avoidance of objects which were dangerous to persons on a railroad track was as much under the control of the plaintiff employee as it was under the control of any other employee of the defendant company. Not only did the plaintiff employee have control of the motor car and the equipment on it, *but the employee had control and supervision of the track over which he was travelling.*

Under these circumstances, we earnestly submit that the Court was in error when it is in effect advising the trial court that once the plaintiff has absolved himself from negligence in the control of the motor car and objects thereon then the jury may apply the doctrine of res ipsa loquitur to the maintenance or omission to maintain the railroad track in a safe condition upon the part of the defendant. The defendant did not have sole control of this railroad operation, and the plaintiff did participate therein at the time of the accident. Such instruction to the jury would therefore be an extension of the doctrine of res ipsa loquitur far beyond the present limits set to that doctrine by the Supreme Court in the *Jesionowski* and *Johnson* cases and by this Circuit Court of Appeals in the *Rocona* case. This would permit an inference of negligence to be raised against the defendant in spite of participation by the plaintiff in the very activity which gave rise to his injuries, that is, the supervision and keeping of the track free from dangerous objects. The plaintiff admittedly took part in this function; therefore the defendant did not have sole control of this function, and the inference therefore can not be made.

C. Conclusion.

Appellee respectfully submits that this Court, in the writing of its Opinion, erred in the respects hereinbefore set forth, and that a rehearing in this matter should be had.

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State of Arizona,
County of Pima—ss.

ARTHUR HENDERSON, being first duly sworn, deposes and says:

That he is a partner in the firm of Knapp, Boyle, Bilby & Thompson, attorneys for appellee in the foregoing matter; that he prepared the appellee's Answering Brief therein, and that he is fully familiar with the law and the facts set forth in the Answering Brief and in the appellee's Opening and Closing Brief, and that he is the attorney who made the oral argument before the above entitled Court.

That he certifies under Rule 25 of this Court that, in his judgment, the above Petition for Rehearing is well founded and that this Petition is not interposed for delay.

ARTHUR HENDERSON

Subscribed and Sworn to before me this 14th day of February, 1951.

WINNIFRED TRUSKY
Notary Public

My Commission Expires:
November 24, 1953